STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2003
v	No. 242321 Wayne Circuit Court
SNEEDEN MOUZON III, Defendant-Appellant.	LC No. 01-007487-01

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for third-degree criminal sexual conduct, MCL 750.520d(1)(b). Defendant was sentenced to fifteen months to fifteen years' imprisonment. We affirm.

Defendant claims on appeal that the trial court erred in admitting rebuttal testimony that was improper both in its purpose and scope. Since defendant did not object at trial to the rebuttal evidence, this Court reviews solely for a plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). "To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

The victim testified that defendant used force to accomplish penetration at her home. During the prosecution's case in chief, the victim did not mention defendant's calling her after he left her home. Defendant, on direct examination, testified that he received a call from the victim on his cell phone while he was driving away from her home. According to him, they had had consensual sexual relations. Defendant testified that during that conversation he revealed to the victim the identity of his girlfriend, and that the victim then hung up on him.[1] The prosecution called the victim as a rebuttal witness. During the prosecution's case in chief the victim had

[1] In his closing argument, defendant argued that the victim, angered by his revelation, then decided to falsely accuse him of rape.

testified that after defendant left her house she called a rape crisis hotline and spoke to a counselor. On rebuttal, the victim stated that defendant called her while she was speaking to the counselor and told her he had been drinking and was sorry. The victim said she told the counselor, who was still on the line, that defendant had just called. The victim then testified that after she hung up from defendant's first call, he again called while she was still speaking to the counselor. She hung up on him again. She stated that he called her at her home again the next day.

The trial court did not err in admitting the prosecution's rebuttal evidence. With regard to the proper purposes and scope of rebuttal evidence, the Michigan Supreme Court has stated:

> Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination. . . . [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [*People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (citations and internal punctuation omitted).]

The victim's rebuttal testimony regarding the phone calls was "responsive to evidence introduced or a theory developed by the defendant," *Figgures*, *supra*, 451 Mich 399, and therefore proper. The rebuttal testimony was also proper to "contradict, repel, explain or disprove" defendant's evidence, and can be fairly described as "tending directly to weaken or impeach the same." *Id.* Defendant himself raised the issue of who called whom after he left the victim's home when he testified that the victim called him on his cell phone after he left her house. This call was key to defendant's theory of the case which was that, during the call, the victim learned the identity of defendant's girlfriend, became angry, and then made a false charge of rape against him.

The victim's testimony that defendant called her contradicts and tends to disprove defendant's testimony that she called him. It also directly weakens defendant's version of events because it is reasonable to assume that if the jury believed the victim when she said that she hung up on defendant and told him not to call back, it would be less likely to believe that she initiated a telephone conversation with defendant during this same time period, as defendant testified.

Apparently to refute the notion that the rebuttal testimony was offered in response to defendant's testimony, defendant claims that it was the prosecution, not the defense, that introduced first the evidence that was the subject of rebuttal. This is a patent mischaracterization of the record which shows that the issue whether defendant called the victim after leaving her home or vice versa was not raised until defendant testified that the victim called him on his cell phone as he was driving away from her home.

Defendant argues that the prosecution improperly divided up the testimony on which it relied, saving some for rebuttal. Defendant relies on *People v Quick*, 58 Mich 321; 25 NW 302 (1885), and later cases citing it, for the proposition that if the prosecution could have introduced evidence in its case in chief, that same evidence is inadmissible in rebuttal. But, as pointed out above, more recent cases have explained that "the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Figgures*, *supra*, 451 Mich 399. Thus, even if the victim's testimony regarding defendant's calling her after he left her house could have been introduced in the prosecution's case in chief, the fact that it was not does not mean the judge erred in admitting it. We also note that part of the rationale applied in *Quick*, namely, that dividing up the prosecution's case would lead to the introduction of new witnesses,[2] is not relevant here. The witness who gave the rebuttal testimony was the victim, who had already testified.

Because the prosecution's rebuttal evidence was both within the proper scope of rebuttal evidence and used for a proper purpose, defendant has failed to show a plain error. Thus, this issue is forfeited.

We affirm.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter

[2] "We have held on several occasions that the defendant has a right to know in advance of the trial what witnesses are to be produced against him, so far as then known, and to have any new witnesses indorsed on the information as soon as discovered. The object of this is not merely to advise a respondent what witnesses will be produced on the main charge. It is to guard him against the production of persons who are unknown, and whose character he should have an opportunity to canvass. It is as important to impeach a rebutting witness as any other." *Quick*, *supra*, 58 Mich 322-323.